STATE OF MICHIGAN
IN THE SUPREME COURT

JOANNE ROWLAND, a/k/a JOAN ROWLAND,

Plaintiff-Appellee,

v

WASHTENAW COUNTY ROAD COMMISSION,

Defendant-Appellant.

Supreme Court No. 130379

Court of Appeals No. 253210

Washtenaw County Circuit Court No. 03-000128-NO

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AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL ON BEHALF OF THE STATE OF MICHIGAN

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II. **Complete retroactivity is the general rule for judicial decisions. *Pohutski* allows exceptions where injustice might result from full retroactivity. Enforcing the plain language of the notice statute – with no prejudice requirement – would cause no injustice. No injured person could reasonably have allowed the notice filing deadline to pass in reliance on the defendant's predicted inability to prove prejudice. Should the reversal of *Hobbs* and *Brown* be given full retroactive effect?**

STATEMENT OF FACTS AND PROCEEDINGS

The Attorney General, on behalf of the State of Michigan, as amicus curiae, adopts the statement of facts and proceedings set forth in appellant Washtenaw County Road Commission's brief on appeal.

INTRODUCTION

This appeal presents two questions: May the Legislature condition the waiver of governmental immunity on the timely filing of notice of the injury and claim? If yes, should a decision of this Court overruling contrary case law be given retroactive effect?

As an express condition to the waiver of immunity for allegedly defective buildings or highways, the legislature required that written notice be given within 120 days of the injury.

After a case ruling that a predecessor 60-day notice provision violated the Due Process and Equal Protection Clauses, this Court ruled that a 120-day notice requirement was "not necessarily unconstitutional"[1] provided the government could prove that its interests in the case had been prejudiced by the lack of timely notice. The prejudice requirement was engrafted onto the statute because "[a]ctual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision."[2] In fact there are several rational reasons for requiring notice, e.g. to permit investigation while memories are fresh and conditions unchanged; to alert the agency to a condition needing prompt action to prevent more injuries; to allow planning for claim-related budgetary needs, etc. Engrafting the prejudice requirement onto the statute constituted judicial legislation in violation of the Separation of Powers Doctrine.

Attorney General Michael A. Cox, on behalf of the State of Michigan, as amicus curiae, continues to have considerable interest in this issue. In countless cases – embracing all forms of tort liability and, for the State, contract liability – the State and other governmental agencies are being required to bear the expense of litigation, settlements, and judgments – even though the plaintiff failed to fulfill a timely notice condition on the waiver of immunity.

Hobbs and *Brown* should be overruled with complete retroactivity.

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[1] *Hobbs v Dep't of State Highways*, 398 Mich 90, 96; 247 NW2d 754 (1976)
[2] *Brown v Manistee Co Rd Comm*, 452 Mich 354, 362; 550 NW2d 215 (1996)

ARGUMENT

I. Governmental agencies are immune from tort liability except as waived by legislation. MCL 691.1404 conditions a limited waiver on notice of the claim being given within 120 days. In 1976 this court in *Hobbs* judicially expanded that waiver, engrafting onto the statute a necessity to show actual prejudice. While subsequent decisions rejected the constitutional underpinnings for that construction, in 1996 *Brown* reaffirmed it, based on stare decisis and legislative acquiescence. *Hobbs* and *Brown* should be overruled.

A. Standard of Review

This case concerns the interpretation of a statute, MCL 691.1404, and of the state constitution; it presents questions of law that are reviewed de novo.[3]

B. Analysis

1. Absent unconstitutionality, the notice condition on a waiver of governmental immunity should be enforced as written.

Section 4 of the Governmental Tort Liability Act (GTLA) waives governmental immunity[4] for persons injured as a proximate cause of a defect in the roadbed surface – on the express condition that the responsible governmental agency be given written notice within 120 days of the injury[5]:

> *As a condition to any recovery* for injuries sustained by reason of any defective highway, *the injured person, within 120 days from the time the injury occurred*, except as otherwise provided in subsection (3) *shall serve a notice on the governmental agency* of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

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[3] *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

[4] While as to the State, the statute waives sovereign immunity, it also waives governmental immunity as to local units of government. *Pohutski v Allen Park*, 465 Mich 675, 682-683; 641 NW2d 219 (2002). Because the instant case concerns a local unit of government, references in this brief will be to governmental immunity, unless otherwise noted.

[5] MCL 691.1404 (1) (emphasis added). An exception is provided, if the injured person is physically or mentally incapable of giving notice.

The plain language of that statute leaves no room for debate as to whether timely notice is or is not a condition for recovery, i.e. a limitation on the waiver of immunity; it is.

In *Pohutski* this Court quoted and adopted Justice Griffin's opinion in *Hadfield v Oakland Co Drain Comm'r*[6] regarding the Legislature's purpose in enacting the GTLA – i.e., to generally immunize governmental agencies from tort liability while performing governmental functions, and to preclude the courts from deciding when, and under what circumstances, governmental immunity should be waived[7]:

> [T]he fundamental purposes of the act were to restore immunity to municipalities, grant immunity to all levels of government when engaged in the exercise or discharge of a governmental function, and prevent judicial abrogation of governmental and sovereign immunity.

Unless the notice condition legislatively imposed on the waiver of governmental immunity offends a provision of the constitution, it must be enforced as written.[8] As this Court stated in *Roberts v Mecosta General Hospital*: "Whatever the merit of [a] policy argument, we are obligated to apply the unambiguous terms of the statute, not our policy preferences."[9] More recently, in *Elezovic v Ford Motor Co*, this Court held: "It is not for us to rework the statute. Our duty is to interpret the statute as written."[10]

2. Review of the case law that judicially imposed the prejudice requirement.

For at least several decades, this Court's "case law on [governmental immunity has been] confused, often irreconcilable, and of little guidance to the bench and bar."[11] In 1984, *Ross*

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[6] *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988).
[7] *Pohutski*, 465 Mich at 688.
[8] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 588; 702 NW2d 539 (2005). "[S]tatutes are to be enforced as written unless they are unconstitutional."
[9] *Roberts v Mecosta General Hospital*, 466 Mich 57, 70; 642 NW2d 663 (2002).
[10] *Elezovic v Ford Motor Co*, 472 Mich 408, 425; 697 NW2d 851 (2005).
[11] *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 596; 363 NW2d 641 (1984).

sought to correct that condition, instructing that governmental immunity was to be broadly construed, while exceptions were to be narrowly construed.[12] But, as this Court observed in *Nawrocki*[13]:

> The failure to consistently follow *Ross*, specifically with regard to the interpretation and application of the highway exception, has precipitated an exhausting line of confusing and contradictory decisions.

A review of case law concerning enforceability of the notice condition specifically, illustrates that point and reveals why the instant case should not be controlled by stare decisis.

Nearly one hundred years ago, in *Moulter v Grand Rapids*, this Court enforced a 10-day notice requirement, recognizing the Legislature's authority to determine whether, and on what terms and conditions, immunity would be waived[14]:

> The right to recover for injuries arising from want of repair of sidewalks, etc., is a purely statutory one in this State. *It being optional with the legislature whether it would confer upon persons injured a right of action* therefore or leave them remediless, *it could attach to the right conferred any limitations it chose.* Whether the limitations imposed are reasonable or unreasonable in such cases are questions for the legislature, and not for the courts.

In 1970 a three-justice plurality opinion in *Grubaugh* disapproved that view of the legislature's authority, adopting a radically different view.[15] At issue was whether a 60-day notice requirement could be applied to a "plaintiff rendered mentally or physically incapacitated by the alleged tortious act of a state or municipal defendant . . . ."[16] The Court found the question to turn on whether the notice provision "is violative of the concepts of due process and equal protection under the law contained in our state and federal constitution."[17] Initially

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[12] *Ross*, 420 Mich at 618.
[13] *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 149; 615 NW2d 702 (2000).
[14] *Moulter v Grand Rapids*, 155 Mich 165, 168-169; 118 NW 919(1908) (emphasis added).
[15] Two justices joined in the result only; one dissented; and, one did not participate.
[16] *Grubaugh v St. Johns,* 384 Mich 165, 167; 180 NW2d 778 (1970).
[17] *Grubaugh,* 384 Mich at 170.

determinative to the Court was whether a "vested right" of the plaintiff would be impaired. Citing *Minty v Auditors*,[18] the Court stated: "The precise issue of the accrual of a vested right under a remedial statue has been previously examined by our Court"[19]

But *Minty* is distinguishable. *Minty* concerned whether a fully accrued cause of action survived repeal of the waiver of governmental immunity, given that the State's waiver of immunity from suit remained in effect.[20] The Court cited various authorities for the proposition that "[t]he repeal of a statute does not take away a right of action for damages which have already accrued," adding, "but a right to be within [that] protection must be a vested right."[21] *Minty* did not involve a failure to give timely notice; there was no unfulfilled condition on the State's waiver of immunity. The right had vested.

The *Grubaugh* court explained why it found that a cause of action was vested[22]:

> Under the statute a plaintiff could institute suit on the first or fifty-ninth day after the injury. To take away his cause of action on the sixty-first day because he could not meet the notice provisions of the act would deprive him of a vested right of action without due process of law.

But to say that enforcement of the notice provision would deprive a plaintiff of a "vested right" is circular – it *assumes* that a statutory opportunity to perfect a claim constituted a vested right, or that a vested right existed to file suit *on the sixty-first day* – notwithstanding the notice

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[18] *Minty v State Auditors*, 336 Mich 370; 58 NW2d 106 (1953).
[19] *Grubaugh,* 384 Mich at 171.
[20] *Minty*, 336 Mich at 397: "Under section 8 of the act, plaintiff had a right to sue the State in the court of claims." The Court distinguished consent to suit from consent to liability: "[B]y *consenting to be sued,* in section 8 of the court of claims act, the State did not thereby waive the right to rely on its sovereign immunity from *liability* as a defense in said suit." 336 Mich at 394 (emphasis supplied).
[21] *Minty*, 336 Mich at 390-391 (emphasis added).
[22] *Grubaugh,* 384 Mich at 175.

condition – and makes that assumption the basis for finding that a vested right existed.[23]

The Court also dispensed with any possibility that the notice requirement serves legitimate purposes, such as providing information to facilitate the making of an investigation. The court observed that units of government then carried insurance and had investigators, police, and attorneys[24]:

> As a result these units and agencies are better prepared to investigate and defend negligence suits than are most private tortfeasors to whom no special notice privileges have been granted by the legislature.

The Court then reversed *Moulter's* view of the Legislature's authority to condition any waiver of governmental immunity, and held that the notice requirement is unconstitutional[25]:

> In view of the above, *we reject and overrule the reasoning under the rule in Moulter, supra, and condemn the purely capricious and arbitrary exercise of legislative power whereby a wrongful and highly injurious invasion of rights is sanctioned* and the litigant who fails to submit the required notice of claim is stripped of all real remedy.
>
> We hold that the notice provisions of § 8 of chapter 22 of the general highway statute are constitutionally void as depriving claimant of due process of law.

As the emphasized language reveals, the Court appears to have substituted its own view of wise public policy for that of the Legislature.[26]

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[23] Just three years earlier the Court enforced a 60-day notice requirement in a tort action against the City of St. Clair Shores. *Kowalczyk v Bailey*, 379 Mich 568, 572; 153 NW2d 660 (1967): "For her failure to comply with the requirement of section 8 of the act, that written notice be given the city within 60 days from the occurrence of her injuries, plaintiff was barred from suing the city."

[24] *Grubaugh,* 384 Mich at 176.

[25] *Grubaugh,* 384 Mich at 176 (emphasis added).

[26] *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999): "We cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated . . . ."

Having decided that the notice requirement deprived an incapacitated plaintiff of his right to due process, the court deferred consideration of the equal protection claim until "some new case [is presented] where a fully competent adult is the victim."[27]

Just over two years later in *Reich*, the Court followed *Grubaugh* and held a 60-day notice requirement unconstitutional as to minor plaintiffs. The Court then found that, as to competent adult plaintiffs, the statute was unconstitutional as a violation of equal protection.[28] Although the waiver of immunity in the statute under consideration, MCL 691.1404, expressly imposed a notice condition on the waiver – a condition that was not imposed as to private tortfeasors – the Court stated that the legislature *intended* to waive the immunity of governmental units "thus putting them on an equal footing with private tortfeasors."[29] The Court treated the plain fact belying any such legislative intent for equal treatment – the notice requirement itself – as an arbitrary splitting of the natural class[30]:

> [T]he notice provisions of the statute arbitrarily split the natural class, *i.e.,* all tortfeasors, into two differently treated subclasses: private tortfeasors to whom no notice of claim is owed and governmental tortfeasors to whom notice is owed.

The Court ruled that the notice condition "is void and of no effect"[31] as contrary to "the recognized purpose of the act" and violative of the right to equal protection of two portions of one natural class[32]:

> This diverse treatment of members of a class along the lines of governmental or private tortfeasors *bears no reasonable relationship* under today's circumstances *to the recognized purpose of the act.* It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guarantees of equal protection.

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[27] *Grubaugh,* 384 Mich at 177.
[28] *Reich v State Highway Dep't*, 386 Mich 617, 623-624; 194 NW2d 700 (1972).
[29] *Reich*, 386 Mich at 623.
[30] *Reich*, 386 Mich at 623.
[31] *Reich*, 386 Mich at 624.
[32] *Reich*, 386 Mich at 623 (emphasis added).

By finding a "purpose of the act" that directly conflicts with the actual words of the act, the Court substituted its policy judgment for that of the Legislature.[33]

A year and one-half later, the Court reversed itself again. In *Carver* the court engrafted a prejudice requirement onto the statute for the stated purpose of *avoiding* a finding of unconstitutionality.[34] At issue was whether the 6-month notice requirement in the Motor Vehicle Accident Claims Act violated due process and equal protection.

First, the Court expressed its antipathy for statutes of limitations and an even greater disapproval of notice requirements[35]:

> [W]e acknowledge frankly that statutes which limit access to the courts by people seeking redress for wrongs are not looked upon with favor by us. We acquiesce in the enforcement of statutes of limitation when we are not persuaded that they unduly restrict such access, but *we look askance at devices such as notice requirements* which have the effect of shortening the period of time set forth in such statutes.

Nonetheless, noting that an untimely notice might prejudice the Secretary of State's ability to investigate and defend against a claim – a legitimate purpose – the Court found that the notice requirement "does not necessarily violate the constitution."[36] The Court ruled that, in those cases where prejudice could be shown, the terms of the statute could be enforced[37]:

> [W]e hold that only upon a showing of prejudice by failure to give such notice, may the claim against the fund be dismissed.

In dissent, Justice Brennan pointed out that the Court was usurping the power of the

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[33] *Elezovic,* Mich at 421-422: "This Court has been clear that the policy behind a statute cannot prevail over what the text actually says. The text must prevail."
[34] *Carver v McKernan*, 390 Mich 96, 100; 211 NW2d 24 (1973): "By positing a legitimate purpose for the notice provision we are constrained to hold that § 18 does not necessarily violate the constitution."
[35] *Carver*, 390 Mich at 99 (emphasis added).
[36] *Carver*, 390 Mich at 100.
[37] *Carver*, 390 Mich at 100.

Legislature by simply disregarding the notice requirement (apparently because the Court disapproved of it)[38]:

> Our Court declines to hold that the statute is unconstitutional. But we go on to say that this constitutionally valid and plainly stated requirement for a notice of claim within six months, does not really mean what it clearly says.
>
> * * *
>
> The rationale of the Court displays a total disregard for the fundamental power of the Legislature to make binding, uniform rules of human conduct.

Four years later, in 1976, the *Hobbs*[39] Court considered the enforceability of what had become a 120-day notice condition on the waiver of immunity for defective highway liability.[40] The Court distinguished *Reich* as the notice period had been increased and adopted the rationale of *Carver*.[41] The Court did not address the *Reich* Court's equal protection analysis that would appear just as relevant to a 120-day notice period as a 60-day notice period. The *Hobbs* court quoted *Carver's* disparagement of statutes of limitations and notice requirements, ruling that the only legitimate purpose is to avoid prejudice in the particular case[42]:

> The rationale of *Carver* is equally applicable to cases brought under the governmental liability act. Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision contained in [MCL 691.1404] is not a bar to claims filed pursuant to [MCL 691.1402].

In a span of about seven years, notice requirements went from enforceable conditions on the waiver of governmental immunity, to unconstitutional requirements, to permissible requirements if prejudice could be shown. Each of those decisions founded its analysis on an imputed legislative intent that was in conflict with the unambiguous language of the statute.

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[38] *Carver*, 390 Mich at 101-102.
[39] *Hobbs*, 398 Mich at 95-96.
[40] As *Reich* had observed, 1970 PA 155 increased the period from 60 days to 120 days and allowed additional time for minors, but that amendment did not apply to the case before the Court. 386 Mich at 622, n 2.
[41] *Carver*, 390 Mich at 95-96.
[42] *Carver*, 390 Mich at 96.

Finally, ten years ago this Court revisited the enforceability of the 120-day notice provision for defective highway liability, in the *Brown* case.[43] Quoting *Carver*, the Court stated that a particular notice provision may be unreasonable if it provides "'an extremely short period.'"[44] But the 120-day notice provision was found to "provide a claimant sufficient time to serve the government agency with notice."[45] The Court ruled: "we do not believe that a 120-day notice provision is unreasonably short."[46] Despite having found the length of the 120-day notice condition reasonable, the court declined to overrule *Hobbs* and enforce the plain language of the statute, stating: "the doctrine of stare decisis mandates its affirmance."[47] Additionally, the Court relied on legislative acquiescence[48]:

> Because the Legislature has not reacted to this Court's interpretation of § 4 in the nearly twenty years since *Hobbs* was decided, we conclude that the Legislature has acquiesced in our interpretation of the statute. Apparently, the Legislature has been content with the way this Court has interpreted § 4.

3. Legislative acquiescence does not justify refusing to enforce the statute.

Justice Riley dissented in *Brown*, pointing out that *Hobbs* had implicitly founded its imputed prejudice requirement on constitutional necessity – thereby precluding the Legislature from overriding the prejudice requirement[49]:

> [T]he Court held that the requirement of prejudice saved the statute from constitutional infirmity. The Legislature, therefore, was without authority during the past twenty years to eliminate the prejudice requirement which the *Hobbs* Court engrafted upon the statute.

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[43] *Brown*, 452 Mich at 356.
[44] *Brown*, 452 Mich at 364.
[45] *Brown*, 452 Mich at 364.
[46] *Brown*, 452 Mich at 364.
[47] *Brown*, 452 Mich at 365.
[48] *Brown*, 452 Mich at 368 (citation and footnote omitted).
[49] *Brown*, 452 Mich at 373.

Aside from the illogic of the *Brown* court's reliance on legislative acquiescence, this Court has recognized the limited utility of the doctrine[50]:

> [T]his Court has made it clear that the doctrine of legislative acquiescence "is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence."

4. Stare decisis does not justify refusing to enforce the statute.

In *Pohutski*[51] this Court summarized four factors to consider before overruling a prior decision, as set forth in *Robinson*[52]:

> (1) whether the earlier case was wrongly decided, (2) whether the decision defies "practical workability," (3) whether reliance interests would work an undue hardship, and (4) whether changes in the law or facts no longer justify the questioned decision.

Application of each of those *Robinson* factors confirms that prior case law should be overruled.

a. *Hobbs* and *Brown* were wrongly decided.

Justice Coleman, dissenting in *Hobbs*, quoted with approval Justice Brennan's dissent in *Reich* to emphasize the authority of the Legislature to impose conditions on the waiver of immunity and the lack of authority in the Court to override them[53]:

> The legislature has declared governmental immunity from tort liability. The legislature has provided specific exceptions to that standard. The legislature has imposed specific conditions upon the exceptional instances of governmental liability. The legislature has the power to make these laws. This Court far exceeds its proper function when it declares this enactment unfair and unenforceable.

The only possible justification for engrafting the prejudice requirement onto the statute – to preserve its constitutionality – is inapplicable for two reasons.

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[50] *Nawrocki*, 463 Mich at 178, n 33.
[51] *Pohutski*, 465 Mich at 694.
[52] *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).
[53] *Hobbs*, 398 Mich at 100-101 (Coleman, J, dissenting) quoting *Reich*, 386 Mich at 626 (Brennan, J, dissenting).

With regard to due process, *Brown* found that, "a 120-day notice provision is [not] unreasonably short."[54] The length of the notice period is not a constitutional impediment; it does not deny reasonable access to the courts.

Additionally, while the requirement has been said to lack a rational basis other than to prevent prejudice to the government's ability to defend against a claim, there are various rational bases for the notice provision, without *requiring proof* of actual prejudice, such as (1) providing the opportunity to investigate and gather evidence to defend against claims while memories are fresh and conditions unchanged, (2) providing an opportunity to protect against additional injuries by impressing on the agency that the defect or condition is a serious one requiring prompt attention – rather than just another defect to be added to a long maintenance list,[55] (3) bringing to the attention of the agency the need to add a project to its formal plans,[56] (4) allowing the agency to prepare timely and more accurate budgets, using information of possible claims to be paid, etc. Any of those reasons supplies a constitutionally sufficient rational basis for the notice requirement.

Requiring proof of prejudice is inherently unreasonable and defeats all of those purposes.

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[54] *Brown*, 452 Mich at 364.

[55] The highway and public building exceptions to governmental immunity require that the government have at least constructive knowledge of the defect, prior to the injury, to be held liable. MCL 691.1406, MCL 691.1403. But conditions warranting repair vastly exceed the resources of the government to address them. By requiring prompt notice of an injury, the very fact that an injury has occurred alerts the government the seriousness of particular defects and can raise their priority for prompt repair.

[56] For example, the magnitude of a problem made manifest by an injury might be such as to require use of bond proceeds, with the associated necessity to go through multiple formal steps to amend the "project list" for that bond issue, at an upcoming monthly meeting of the State Transportation Commission. See MCL 247.668b(4). The more timely the notice, the more quickly the Michigan Department of Transportation can become aware of the need, evaluate it, and implement necessary administrative steps to make the project possible.

It can be impossible to know – or prove – that the agency has been prejudiced when it has been denied the chance to investigate an event promptly after its occurrence, while circumstances might yield a more accurate reconstruction.

With regard to equal protection, the only challenge to the statute has been to the disparate treatment between private and public tortfeasors. That challenge was founded on the flawed notion that the Legislature intended to put government tortfeasors on an equal footing with private tortfeasors. In terms as clear as could be stated, the Legislature required compliance with the notice requirement for suits against government tortfreasors – imposing no similar requirement as to private tortfeasors. It was never logically possible to find that the Legislature intended to endorse a natural class of all tortfeasors putting them all on an equal footing.

Robinson[57] reiterated the finding in *Ross*[58]: "This Court has repeatedly acknowledged that governmental immunity legislation 'evidences a clear legislative judgment that public and private tortfeasors should be treated differently.'" There is no legitimacy to the only justification given for finding the notice requirement violative of the Equal Protection Clause.

b. *Hobbs* and *Brown* defy practical workability.

The Legislature prescribed a very clear bright line condition on the waiver of immunity under MCL 691.1404 – giving notice 120 days of the injury. That is a highly "workable" standard.

The prejudice requirement is far more subjective. Absent fairly clear cut cases, agencies have no way of being sure whether particular consequences of untimely notice will be found to constitute "prejudice." A question of fact is presented. The agency may be unable to prove

[57] *Robinson*, 462 Mich at 459.
[58] *Ross*, 420 Mich at 618.

whether witnesses' memories, or conditions, have been altered by the passage of time. The agency simply may not know what a witness has forgotten and whether it has been prejudiced.[59]

The practical effect of depriving the governmental agency of the bright line statutory standard, will often be its payment of otherwise invalid claims, out of fear that the fact-finder may find no prejudice and render a substantial award. Regardless of whether the agency resists the forces urging settlement, it may be required to pursue expensive discovery and pretrial litigation to determine whether it has been prejudiced – an activity that is itself prejudicial[60]:

> [A] central purpose of governmental immunity . . . is, to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.

By enforcing the statutory notice condition on the waiver of immunity, the Court will both honor the constitutional prerogatives of the Legislature, and facilitate the prompt disposition of ill-founded lawsuits.

c. No reliance interests in *Hobbs* and *Brown* would work an undue hardship.

Quoting *Robinson*, this Court stated[61]:

> The reliance must be the sort that "causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event."

The plain words of the statute instruct a claimant to file timely notice. An injured party would conform to that statute and file timely notice: "[I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions."[62] The prejudice requirement is not itself

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[59] The Court imposed the burden of proof on the governmental agency. "Whenever the Secretary claims to have been prejudiced by the lack of notice, he should be afforded the opportunity to show such prejudice." *Carver*, 390 Mich at 100.
[60] *Mack v Detroit*, 467 Mich 186, 203, n 18; 649 NW2d 47 (2002).
[61] *Robertson v Daimler-Chrysler Corp*, 465 Mich 732, 757-758; 641 NW2d 567 (2002), quoting *Robinson*, 462 Mich at 467.
[62] *Pohutski*, 465 Mich at 694.

a rule of practice on which an injured party might rely. No person could have reasonably failed to file notice – relying on *Hobbs* and *Brown*. No injured person *could know*, in advance, whether a governmental defendant might be able to prove prejudice and secure dismissal of the claim.

Furthermore, post-deadline reliance is not relevant[63]: "Such an after-the-fact awareness does not implicate the kind of reliance or expectation interest contemplated by our stare decisis inquiry."

"[B]ecause *lawyers* will have to relearn the law" is also not "a 'reliance' interest sufficient to preclude a plainly flawed reading of the law from being corrected."[64] Moreover, any lawyer following the decisions of this Court in the field of governmental immunity over the past several years must have known that the principles on which *Hobbs* and *Brown* were founded, had been rejected by this Court.[65]

d. Changes in the law require overruling *Hobbs* and *Brown*.

Beginning with *Ross*, this Court has tried to clarify the law of governmental immunity, reconciling conflicting decisions and restoring deference to legislative policy choices.

The notions that led the Court in *Hobbs* and *Brown* to judicially engraft a prejudice requirement onto MCL 691.1404 have been rejected[66]:

> [T]he fundamental purposes of the act were to restore immunity to municipalities, grant immunity to all levels of government when engaged in the exercise or discharge of a governmental function, and prevent judicial abrogation of governmental and sovereign immunity.
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> * * *

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[63] *Robertson*, 465 Mich at 758.
[64] *Robertson*, 465 Mich at 760 (emphasis supplied).
[65] See pp 20-21 of this brief.
[66] *Pohutski*, 465 Mich at 688, 689.

> [W]e are bound by the clear and unambiguous statutory text; we lack constitutional authority to impose on the people of this state our individual policy preferences regarding the availability of lawsuits arising from the operation of a sewage system. We must "seek to faithfully construe and apply those stated public policy choices made by the Legislature" in drafting the governmental tort liability act.

In the specific instance of overruling case law that had impermissibly expanded the exceptions to governmental immunity, this Court stated in *Nawrocki*[67]:

> As we recently explained in *Robinson, supra*, a judicial tribunal is most strongly justified in its reversal of precedent when adherence to such precedent would perpetuate a plainly incorrect interpretation of the language of a constitutional provision or statute.

Moreover, in *Robinson* this Court reiterated that immunity is to be broadly construed while exceptions are narrowly construed[68]:

> We begin our analysis with the basic principle, of which there is no longer any dispute, that the grant of immunity in is broad and that the statutory exceptions thereto are to be narrowly construed.
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> * * *
>
> Michigan strictly construes statutes imposing liability on the state in derogation of the common-law rule of sovereign immunity.

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[67] *Nawrocki*, 463 Mich at 181.

[68] *Robinson*, 462 Mich at 455-459 (citations and footnotes omitted).

II. Complete retroactivity is the general rule for judicial decisions. *Pohutski* allows exceptions where injustice might result from full retroactivity. Enforcing the plain language of the notice statute – with no prejudice requirement – would cause no injustice. No injured person could reasonably have allowed the notice filing deadline to pass in reliance on the defendant's predicted inability to prove prejudice. The reversal of *Hobbs* and *Brown* should be given full retroactive effect.

In its Order granting leave to appeal, this Court directed the parties to address "whether a decision overruling *Hobbs* and *Brown* should have retroactive or prospective application under the standard discussed in *Pohutski*."

1. Under the *Pohutski* standards, complete retroactivity is warranted

In *Pohutski* this Court stated: "Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity."[69] The Court set forth four factors to consider "in determining when a decision should *not* have retroactive application"[70]:

> (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, [] (3) the effect of retroactivity on the administration of justice [and (4)] whether the decision clearly established a new principle of law.

a. Purpose to be served by the new rule.

The purpose of the new rule is simple – restore due constitutional deference to the plain language of the statute and the authority of the Legislature to determine the conditions under which it chooses to waive governmental immunity. The new rule will allow the Legislature to set public policy on how to allocate public funds among the overwhelming and conflicting demands for them. At issue is a fundamental precept of constitutional democracy – the separation of governmental powers. The new rule will end a continuing violation of the precept. It will also treat all injured parties who fail to give timely notice alike.

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[69] *Pohutski*, 465 Mich at 696.
[70] *Pohutski*, 465 Mich at 696 (emphasis added; citations omitted).

b. The extent of reliance on the old rule.

The nature of the old rule negates the possibility that injured parties would have relied on it. Even under *Hobbs* and *Brown*, an injured party failed to give the statutory notice at his peril. It was always possible that the defendant agency could prove that it had been prejudiced by the lack of timely notice. No injured party – no legal counsel for an injured party – could reasonably assert that his failure to give timely notice was in reliance on *Hobbs* and *Brown* and a predicted inability of the defendant to prove prejudice.

c. The effect of retroactivity on the administration of justice.

According retroactivity to the new rule would not harm the administration of justice.

No injured party has a right to compensation from the public fisc, simply because he had the good fortune to file his notice before circumstances arose in which the defendant could prove prejudice. Injured plaintiffs have enjoyed windfalls by virtue of judicial fiat. There is no justice in judicially waiving governmental immunity for those who neglected their rights, while enforcing governmental immunity in the myriad circumstances in which injured persons are unable to bring their claims within a statutory exception.

The bright line test of the new rule will enhance, not impair, judicial efficiency. Fewer cases will be filed; fewer cases will be managed by the courts.

Unlike the *Pohutski* case, according retroactivity will not create an artificial class of plaintiffs caught between two rules – one judicial and one legislative – that would allow compensation for all but those caught in the interstice.[71]

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[71] In *Pohutski*, this Court observed: "[I]f we applied our holding in this case retroactively, the plaintiffs in cases currently pending would not be afforded relief under *Hadfield* or 2001 PA 222. Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing." 465 Mich at 699.

d. Whether the decision clearly established a new principle of law.

This Court approached this fourth factor by relating it to the desire to avoid injustice, where injustice might result from giving a new rule retroactivity[72]:

> Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity. *For example, a holding that overrules settled precedent may properly be limited to prospective application.*

There is no risk of injustice from giving retroactivity to the new rule, and it does not establish a new principle of law. The statute has always been clear. Enforcement of the statute cannot be unexpected by anyone familiar with the evolution of this field of law – particularly in the past few years. While such enforcement of the statute has been forestalled in many cases by the *Hobbs* and *Brown* decisions, the bases for those decisions have been rejected by this Court in numerous cases – dating back to well before the beginning date of a retroactive application.

In 1984, this Court rejected the notion that the Legislature intended to place private and public tortfeasors on an equal footing.[73] In 1996, this Court recognized that a period of 120 days within which notice must be given is not too short.[74] In 2000, this Court confirmed that the judiciary may not substitute its policy choices for those of the Legislature in regard to governmental immunity.[75] No one could thereafter rely on judicial blindness to the myriad

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[72] *Pohutski*, 465 Mich at 696 (emphasis added; citations omitted).
[73] *Ross*, 420 Mich at 618: "The Legislature's refusal to abolish completely sovereign and governmental immunity, despite this Court's recent attempts to do so, evidences a clear legislative judgment that public and private tortfeasors should be treated differently." Also see, *Brown*, 452 Mich at 361, n 12.
[74] *Brown*, 452 Mich at 364: "We do not believe that a 120-day notice provision is unreasonably short."
[75] *Nawrocki*, 463 Mich at 179: "Maintenance of an appropriate deference for, and application of, the public policy choices made by the Legislature, as reflected in the plain language of the statutory highway exception, ensures that determinations regarding how to best allocate limited public highway funds are left to the proper authorities."

rational purposes that might be served by a notice requirement. In 1999, this Court eschewed reliance on "legislative acquiescence" as a justification for retaining a plainly ill-founded interpretation of law.[76] Finally, in 2000 this Court reiterated that it "is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned."[77]

The reversal of *Hobbs* and *Brown* could not have been more clearly foreshadowed.[78]

2. As to State defendants, complete retroactivity is required.

Pohutski held that the State may not be subject to liability without its consent[79]:

> From the time of Michigan's statehood, this Court's jurisprudence has recognized that the state, as sovereign, is immune from suit unless it consents, and that any relinquishment of sovereign immunity must be strictly interpreted. Sovereign immunity exists in Michigan because the state created the courts and so is not subject to them.

It is, thus, beyond the power of the Court to judicially waive the State's sovereign immunity. The Court has no authority to arrogate to itself jurisdiction over claims barred by sovereign immunity. "When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void."[80]

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[76] *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999): "'[L]egislative acquiescence' is a highly disfavored doctrine of statutory construction."

[77] *Robinson*, 462 Mich at 464. "[T]his Court has no obligation to perpetuate error simply because it may have reached a wrong result in one of its earlier decisions. Thus, the doctrine of stare decisis does not tie the law to past, wrongly decided cases solely in the interest of stability and continuity." 462 Mich at 464, n 22.

[78] A panel of the Court of Appeals recognized the likelihood that this Court would overrule *Hobbs* and *Brown*: *Middleton v Marquette*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 251855): "[W]e agree with the trial court's observation that defendant in all likelihood will prevail in the Supreme Court, but that until it does so, we are obligated to follow precedent and rule in favor of plaintiffs."

[79] *Pohutski*, 465 Mich at 681-682 (citations omitted).

[80] *Fox v Bd of Regents of Univ of Michigan*, 375 Mich 238, 242; 134 NW2d 146 (1965).

CONCLUSION

Hobbs and *Brown* were wrongly decided; they stand as discordant anachronisms in Michigan's jurisprudence. The notice provision of MCL 691.1404 – like the similar provision in other statutes – is constitutional as written.[81] Unless this Court overrules *Hobbs* and *Brown*, lower courts will remain obligated to enforce a judicially-created prejudice requirement that has no constitutional justification and is contrary to the plain and unambiguous notice requirement of the statute. This substitution of judicial policy decisions for those of the Legislature not only violates the fundamental precepts of our governance, it has important and practical financial effects on all units of government – requiring them to bear additional and unnecessary expenses to defend and pay untimely claims.

[81] Notice conditions similar to MCL 691.1404 are set forth in various other statutes providing exceptions to governmental immunity. For example, MCL 691.1406 provides: "As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect." With certain exceptions, MCL 691.1419 requires the giving of notice "within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered" to recover damages for a sewage disposal system event. Apart from those very specific notice requirements for specific classes of claims, the Court of Claims Act, MCL 600.6431, requires a claimant against the State to give notice "1 year after such claim has accrued." For actions other than those described in more specific statutes, in "all actions for property damage or personal injuries" the notice must be given "within 6 months following the happening of the event giving rise to the cause of action." Enforcement of all of them has been frustrated because of the *Hobbs* and *Brown* decisions.

RELIEF

The Attorney General respectfully asks that this Honorable Court reverse *Hobbs* and *Brown* and give full retroactive effect to that decision.

Respectfully submitted,

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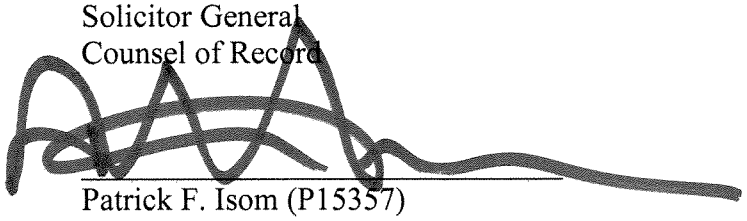

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